Supreme Court, U.S.
FILED
JAN 28 2014
OFFICE OF THE CLERK

Nos. 13-354, 13-356

In the Supreme Court of the United States

KATHLEEN SEBELIUS, et al.,
Petitioners,

v.

HOBBY LOBBY STORES, INC., et al.,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., et al.,
Petitioners,

v.

KATHLEEN SEBELIUS, et al.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF AMERICAN CENTER FOR LAW & JUSTICE AND TWENTY-ONE FAMILY BUSINESS OWNERS AS *AMICI CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, ET AL.

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INTEREST OF *AMICI*[1]

Amicus, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or for amici, *e.g.*, *FCC v. Fox TV*, 132 S. Ct. 2307 (2012); *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007).

The federal regulation at issue in these cases requires employers to pay for and provide abortifacient drugs and devices, contraception, sterilization, and related patient education and counseling services in their health insurance plans ("the Mandate"). The ACLJ has been active in litigation concerning that Mandate. In total, the ACLJ currently represents thirty-two individuals and corporations in seven pending actions against the government, including a case with a petition for certiorari currently pending

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[1] No counsel for a party authored this brief in whole or in part. No person or entity aside from *amici curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The government and Conestoga Wood Specialties have filed notices with this Court consenting to the filing of *amicus curiae* briefs, and Hobby Lobby has consented to the filing of this brief.

before this Court.[2] The ACLJ has obtained preliminary injunctive relief for its clients in all seven cases.[3]

Amici, Frank O'Brien, Cyril and Jane Korte, Paul and Henry Griesedieck, Francis and Philip Gilardi, Catherine and Milton Hartenbower, William Lindsay, and the Bick Family[4] are all ACLJ clients in challenges to the Mandate. These individuals, in addition to *Amici* Robert and Jacquelyn Gallagher, are owners of family businesses with religious objections to paying for and providing contraceptive services pursuant to the Mandate.

O'Brien is the sole shareholder and manager of O'Brien Industrial Holdings in St. Louis, Missouri. The Kortes, husband and wife, are equal shareholders who together own a controlling interest in Korte &

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[2] *Gilardi v. Sebelius*, No. 13-567 (filed Nov. 5, 2013).

[3] *See O'Brien v. U.S. HHS*, No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); *Am. Pulverizer Co. v. U.S. HHS* 2012 U.S. Dist. LEXIS 182307 (W.D. Mo. Dec. 20, 2012); *Korte v. Sebelius*, 3:12-cv-01072-MJR-PMF, ECF Doc. 74 (S.D. Ill. Jan. 13, 2014) (granting preliminary injunction pursuant to *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013)); *Lindsay v. U.S. HHS*, No. 1:13-cv-01210, ECF Docs. 20-21 (N.D. Ill. Mar. 20, 2013); *Gilardi v. U.S. HHS*, No. 13-5069 (D.C. Cir. Dec. 11, 2013) (per curiam order staying issuance of mandate and maintaining injunction pending appeal); *Bick Holdings, Inc. v. U.S. HHS*, No. 4:13-cv-462-AGF, ECF Doc. 19 (E.D. Mo. Apr. 1, 2013); *Hartenbower v. U.S. HHS*, No. 1:13-cv-2253, ECF Doc. 21 (N.D. Ill. Jan. 21, 2014).

[4] The Bick Family includes Mary Frances Callahan, Mary Clare Bick, James Patrick Bick, Jr., William Joseph Bick, Mary Patricia Davies, Joseph John Bick, Francis Xavier Bick, Mary Margaret Jonz, and Mary Sarah Alexander.

Luitjohan Contractors, Inc. in Highland, Illinois. The Griesedieck brothers together manage and have a controlling interest in four companies, including American Pulverizer Co. in St. Louis, Missouri. The Hartenbowers, husband and wife, together own and control Hart Electric, LLC and H.I. Cable, LLC in Lostant, Illinois. William Lindsay owns the controlling interest in, and is the managing partner of, the law firm, Lindsay, Rappaport & Postel, LLC in Chicago, Illinois. The nine brothers and sisters of the Bick Family together own Bick Holdings, Inc. and the Bick Group, Inc. in St. Louis, Missouri. The Gallaghers, husband and wife, together have a controlling interest in Good Will Publishers, Inc. in Gastonia, North Carolina.

To date, and except for the Gallaghers, each of these individuals and the closely-held corporations they own and control have filed suit against the government claiming, *inter alia*, that the Mandate violates their rights under the Religious Freedom Restoration Act ("RFRA"). All *Amici* who have filed suit have been awarded preliminary injunctive relief from having to comply with the Mandate.[5] The future ability of these *Amici* to manage their businesses pursuant to their religious beliefs is directly at stake in these cases.

In addition, this brief is filed on behalf of more than 90,000 supporters of the ACLJ who specifically requested that they be included in this brief as an expression of their opposition to the Mandate's encroachment on religious civil liberties as protected by RFRA and the First Amendment.

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[5] *See* n.3, *supra*.

INTRODUCTION

Amici urge this Court, in its adjudication of the issues involved in these cases, to be mindful of the dignity of individual conscience and the right of religious exercise our forefathers held sacred in the founding of this country.

James Madison, the Father of the Constitution, opined that "[c]onscience is the most sacred of all property," and that man "has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them."[6] George Washington, the Father of the Country, noted that "the establishment of Civil and Religious Liberty was the Motive that induced me to the field of battle."[7] Thomas Jefferson wrote that "[n]o provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority."[8]

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[6] *Property* (March 29, 1792), in THE FOUNDERS' CONSTITUTION, Vol. 1, Doc. 23 (P. Kurland & R. Lerner eds. 1987).

[7] Michael Novak and Jane Novak, WASHINGTON'S GOD: RELIGION, LIBERTY, AND THE FATHER OF OUR COUNTRY, p. 111 (2006).

[8] Letter from President Thomas Jefferson to the Society of the Methodist Episcopal Church at New London, Conn. (Feb. 4, 1809). One provision of Jefferson's Bill for Establishing Religious Freedom, originally drafted in 1779, has special relevance to the Mandate challenged in the cases at bar: "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." *A Bill for Establishing Religious Freedom*, in THE FOUNDERS' CONSTITUTION, *supra* n.6, at Vol. 5, Doc. 37.

In fact, even before the ratification of the U.S Constitution in 1788, and even before the signing of the Declaration of Independence in 1776, the Continental Congress passed a resolution in 1775 exempting individuals with pacifist religious convictions from military conscription:

> As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.[9]

Thus, even when the country was in dire need of men to take up arms to fight for independence, our forefathers knew that conscience is inviolable and must be honored. They understood that to conscript men into military service against their religious conscience would have undermined the very cause of liberty to which they pledged their lives, fortunes, and sacred honor.

Whether this country will continue to preserve the dignity of conscience and robustly protect religious freedom in the future largely depends on how this Court rules in the cases at bar. If the government is permitted to conscript citizens through their businesses

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[9] Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harvard L. Rev. 1409, 1469 (1990).

to pay for and provide drugs and services to which they are religiously and steadfastly opposed in violation of their conscience, as the government does through the Mandate, the liberties that our forefathers struggled to secure will be significantly diminished.

Amici business owners, like the Hahn family in *Conestoga Wood* and the Green family in *Hobby Lobby*, wish to run their businesses in a manner consistent with their religious beliefs. This is not a novel concept. Most, if not all, religious traditions teach that every dimension of one's life, whether personal or public, in the home or in the workplace, should be directed, first and foremost, by one's religious commitments. For such people of faith, religion is not a matter of mere taste, preference, or inclination that can be set aside or ignored when materially advantageous to do so. It is a fundamental and guiding principle that shapes how they think, act, and live their lives in the world.

This is no less true when it comes to business, whether working for a company or owning and controlling one. Judaism, Christianity, and Islam, for example, all place religious and moral obligations on how one conducts oneself in business.[10] They each reject the idea that a business owner is insulated, morally speaking, from the actions of his business. Each of them "prohibit businesses from providing harmful products or services that others would use to engage in harmful conduct."[11]

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[10] *See* Mark L. Rienzi, *God and the Profits*, 21 Geo. Mason L. Rev. 59, 67 (2013).

[11] *Id.*

As the Catholic Church's Pontifical Council for Justice and Peace has stated with respect to living one's faith and engaging in business:

> Dividing the demands of one's faith from one's work in business is a fundamental error which contributes to much of the damage done by businesses in our world today. . . . The divided life is not unified or integrated; it is fundamentally disordered, and thus fails to live up to God's call.[12]

This statement reflects the teaching of Jesus Christ, who, in his Sermon on the Mount uttered words that have echoed throughout history:

> No one can serve two masters, for either he will hate the one and love the other, or he will be devoted to the one and despise the other. You cannot serve God and money.

Matthew, 6:24 (ESV).

This admonition makes abundantly and forcefully clear, at least to those who choose to adhere to the teachings of Jesus, that one's obligation to God must take precedence over all other obligations and endeavors, including the pursuit of profit. A Christian business owner, for example, such as any one of the *Amici*, faced with a law requiring management of the company in a way that violates the owner's religious beliefs, must answer with the words of St. Peter and

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[12] *Vocation of the Business Leader: A Reflection* at p. 6, ¶ 10 (Nov. 2012), http://www.stthomas.edu/cathstudies/cst/VocationBusinessLead/VocationTurksonRemar/VocationBk3rdEdition.pdf.

the apostles: "We must obey God rather than men." *Acts*, 5:29 (ESV). Such a stance of conscience is consistent with James Madison's position, who wrote that one's duty to the "Creator . . . is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[13] *Cf. Girouard v. United States*, 328 U.S. 61, 68 (1946) ("The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State.").

Thanks in large part to this country's "happy tradition of avoiding unnecessary clashes with the dictates of conscience," *Gillette v. United States*, 401 U.S. 437, 453 (1970), *Amici* have never before had to resolve such a conflict in the management of their businesses. Indeed, until the promulgation of the Mandate at issue here, no federal law or regulation compelled *Amici* to run their businesses in violation of their religious beliefs or commitments. *Amici* were free to practice their respective trades, such as Frank O'Brien in manufacturing industrial materials, William Lindsay in practicing law, and the Gallaghers in publishing Bibles, in a manner consistent with their religious beliefs. Now, however, as a direct result of the Mandate, the Hahns, the Greens, and *Amici* business owners face a stark choice: abandon their beliefs in order to stay in business, or abandon their businesses in order to stay true to their beliefs. That is a choice that the federal government, bound by the Free Exercise Clause and RFRA, "the most important

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[13] *A Memorial and Remonstrance Against Religious Assessments* (1785), in THE SACRED RIGHTS OF CONSCIENCE, p. 309 (D. Dreisbach & M.D. Hall eds. 2009).

congressional action with respect to religion since the First Congress proposed the First Amendment,"[14] may not lawfully impose upon them.

In *Conestoga Wood Specialties Corp. v. Secretary of U.S. Dep't Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), the Third Circuit held that the Hahns themselves had no viable RFRA or Free Exercise claims against the Mandate, and in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), there was no majority decision regarding whether the Green family had RFRA or Free Exercise claims against the Mandate. No matter how this Court rules on whether a closely-held corporation can operate under religious norms, and thus invoke the protection of religious exercise afforded by RFRA and the First Amendment, it should hold that where, as here, a federal regulation compels owners and managers of such a corporation to take actions in violation of their religious beliefs, their religious exercise is substantially burdened by that regulation and, pursuant to RFRA and the Free Exercise Clause, these individuals can challenge it in court.

SUMMARY OF ARGUMENT

According to the government, the owners of a closely-held corporation who oppose implementing the Mandate have no legal claim to challenge it because the Mandate does not injure them, and the corporation itself has no legal claim because a corporation cannot exercise religion.

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[14] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 243 (1994).

This Court should reject the government's "heads I win; tails you lose" formula for prevailing in these cases.

When family members, like *Amici* business owners, incorporate a business, they do not surrender the right to manage that business according to their religious beliefs. For them, running their business in a manner that reflects their religious values and ideals is part and parcel of their identity as people of faith. Pursuant to their religious beliefs, they measure success in business not only in terms of profit, but in how they serve God and others.

Unlike the multitude of state and federal regulations that *Amici* direct their businesses to comply with, the Mandate crosses the line, and they cannot, in good conscience, implement it without violating their religious beliefs. Contrary to the government's assertion, the Mandate imposes a very real and palpable injury on such owners and managers. A corporation can only act through its agents, and when those agents are also the owners of a closely-held corporation, like Conestoga Wood Specialties, Hobby Lobby, or Mardel, it is plainly wrong to argue they are not harmed or injured by a regulation that, like the Mandate, forces them to manage that corporation in violation of their religious conscience.

Not only does the Mandate injure such owners, it substantially burdens their religious exercise. It imposes on them a Hobson's choice of either (1) complying with the Mandate and violating their religious beliefs, or (2) not complying and likely losing their companies due to ruinous penalties. Even if the Mandate's burden on the owners' religious exercise is

characterized as indirect, because the Mandate is directly imposed upon the corporation, it is nonetheless a substantial one.

Finally, this Court should reject any argument that ruling in favor of the religious claimants here will unleash an onslaught of challenges to various government regulations by businesses and their owners. RFRA itself provides two limiting principles to prevent a hypothetical flood of employer challenges to various regulations: (1) most regulations do not even arguably burden anyone's religious exercise, and (2) RFRA provides no exemption when a regulation is the least restrictive means of achieving a compelling governmental interest. In addition, any religious exercise must be *sincere*, *i.e.*, not falsely conjured up for the sole purpose of avoiding the regulation. This Court should not reject the valid RFRA claims asserted here due to any speculative or unfounded fear of future RFRA litigation.

ARGUMENT

I. Individuals Do Not Forfeit Their Free Exercise Rights By Entering the Economic Arena.

In *Braunfeld v. Brown*, 366 U.S. 599 (1961), Justice Stewart wrote:

> Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me this is not something that can be swept under the rug and forgotten in the interest of Sunday togetherness.

> I think the impact of this law upon these appellants grossly violates their constitutional right to the free exercise of religion.

Id. at 616 (Stewart, J., dissenting).

Who were the petitioners in *Braunfeld*? A group of Orthodox Jewish merchants engaged in the obviously for-profit business of selling clothes and furniture. And while a majority of the Court in this pre-*Sherbert* and *Yoder* case rejected, on other grounds, the merchants' free exercise challenge to Pennsylvania's Sunday closing law, no member of the Court questioned the right of those for-profit business owners to bring a free exercise challenge to a law that—quite indirectly—had an adverse economic impact on their businesses.

Old Order Amish farmer Lee was also engaged in a for-profit business. *United States v. Lee*, 455 U.S. 252 (1982). And while the Court ultimately held that his free exercise claim had to yield to a compelling state interest in a uniform Social Security tax system, no member of the Court expressed any doubt about the right of this for-profit business owner to bring a free exercise claim. Similarly, the pursuit of economic gain did not foreclose otherwise meritorious free exercise claims in this Court's unemployment benefit cases. *See, e.g., Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

One would think that these cases close the door on the notion that one who engages in commercial activity must abandon the statutory and constitutionally protected right to exercise religion. Yet, the government argues that *Braunfeld*, *Lee*, and similar cases are categorically different from the cases

challenging the Mandate, and for one reason: *the corporate form*. The government asserts that when religious persons incorporate a business, they forfeit any right to challenge a law that compels their corporation to act in violation of their own religious beliefs. This, in turn, leads to the government's "heads I win, tails you lose" argument that neither a for-profit corporation nor its owners can challenge a law under RFRA that burdens the religious exercise of the corporation or its owners when the corporation is the object of the regulation. According to the government, the owners cannot bring the claim because they are legally distinct from the corporation and thus are not injured by the regulation, and the corporation itself cannot bring the claim because a corporation is not a person capable of exercising religion.

The practical result of such an argument is as alarming as it is extraordinary: a shop owned by Seventh-day Adventists that does not open on Saturday for religious reasons would have to comply with a law requiring certain businesses to remain open seven days a week. A deli run by a Jewish family that does not sell pork for religious reasons would have to comply with a regulation that requires food establishments to sell pork. A medical practice operated by Catholics who do not conduct abortions for religious reasons would be forced to do so by a law requiring all OB/GYN medical practices to offer abortion services. No court would be able to reach the merits of any religious freedom claim brought by these or similar parties.

This Court should reject the government's attempt to evade review of the merits of such RFRA claims. As argued herein, owners of closely-held corporations have

a right under RFRA to pursue a claim against a regulation that compels them to manage that corporation in violation of their religious beliefs. This is seen most clearly in the cases under review, where the Mandate requires business owners to do just that.

II. For Some, Owning and Managing a Business is a Religious Vocation That Not Only Prohibits Them From Undertaking Certain Acts, But Inspires Them to Work For the Good of Others.

Regardless of whether a for-profit or secular corporation is a "person" capable of exercising religion, and thus able to invoke the protections of RFRA or the Free Exercise Clause, there can be no doubt that *individual* owners of closely-held corporations, like the Hahns, the Greens, and *Amici*, are "persons" under both federal law and the First Amendment.[15] There can also be no dispute that such individuals are able to exercise religion and invoke the protections of RFRA and the Free Exercise Clause. Finally, there can be no dispute that, as a factual matter, some employers choose to manage their corporations in a manner that reflects their religious beliefs as a distinct way of fulfilling a religious vocation.

Amicus Frank O'Brien's choice, for example, to commit O'Brien Industrial Holdings ("OIH") "to make

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[15] To be clear, *Amici* believe that a for-profit or secular corporation can invoke the protections of RFRA and the Free Exercise Clause in their own right. In addition to arguing this very point in the lower courts, *see supra*, n.3, it is the issue on which *Amicus* ACLJ has filed a petition for a writ of certiorari. *See Gilardi v. Sebelius*, No. 13-567 (filed Nov. 5, 2013).

our labor a pleasing offering to the Lord while enriching our families and society," in addition to requiring it to act in accordance with the Golden Rule and the Ten Commandments,[16] cannot be described as anything but a religious act, imbuing the company with an ethos and purpose beyond that of simply making a profit.

O'Brien's mission statement for OIH is hardly an abstract platitude. Following the exhortation of St. Paul to "[w]ork hard and willingly but do it for the Lord and not for the sake of men," O'Brien has made it a goal of OIH "for all of our people to have the ability to own their own home," through a salary and an annual profit sharing bonus.[17] It is a goal of the company "for all of our people to have the ability to send their children to college," through a scholarship program. It is a further goal of OIH "for all of our people to have the opportunity to retire with dignity," through a retirement plan. It was Frank O'Brien's religious beliefs that motivated and inspired him to establish these goals for OIH.

Furthermore, Frank O'Brien's religiously inspired charitable work goes beyond the four walls of his business. In his desire for OIH to play a role in enriching society, O'Brien initiated the St. Nicholas Fund in 2008, named after the fourth century bishop of

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[16] O'Brien Industrial Holdings, LLC, *Mission & Values*, http://www.christyco.com/mission_and_values.html.

[17] O'Brien Industrial Holdings, LLC, *Explanation of Mission & Values*, http://www.christyco.com/mission_and_values_details.html.

Myra.[18] This fund, supported in part by tithing based on earnings of the company, offers monetary support to those in need, and OIH employees are encouraged to "keep their eyes open" to identify where such support might be necessary.

Thus, for a business owner like Frank O'Brien, managing the business is not just a way of putting food on the table for himself, his employees, and their families. It is a *vocation*; an answer to a call to use his talents, resources, and abilities to serve God and others through his company. Asking someone like Frank O'Brien to set aside his religious beliefs in how he manages his own corporation would be tantamount to asking him to stop running his company entirely.

Frank O'Brien is not alone in this regard. *Amicus* the Bick Family has chosen to adopt and incorporate a specifically religious standard with respect to its business practices:

> We believe in the Christian principles that form the societal mores the founders of our country believed necessary for our Democracy to work. In our dealings with customers, employees, owners, and all members of the community, we must above all strive to act in a manner which adheres to the Judeo-Christian principles of ethical behavior.[19]

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[18] *Id.*

[19] Bick Group, *Bick Group Values*, http://www.bickgroup.com/bick-group-values.asp.

For owners of closely-held corporations like the Bicks, it would be unfathomable to run a business in a manner that is inconsistent with the Golden Rule or the Judeo-Christian idea that all persons are created in the image of God and thus deserving of respect. For this reason, a government regulation compelling the Bicks to direct their company to undertake actions in violation of their understanding of Christian morality would undermine the very ethics upon which their corporation was founded.

For employers like *Amici* Frank and Phil Gilardi, owners of Freshway Foods and Freshway Logistics, it is their religious beliefs that inspire them to direct their companies to undertake any number of charitable activities within their community, such as making food and monetary donations to the YMCA, Holy Angel's Soup Kitchen, United Way, Habitat for Humanity, American Legion, Bill McMillian's Needy Children, Elizabeth's New Life Center, and local schools.[20] Examples of such charitable deeds further demonstrate a key principle of religious practice: it not only *proscribes* certain actions, it *prescribes* works of goodness, kindness, and generosity.

In fact, at the direction of the Gilardis, and as motivated by their religious beliefs, the Freshway companies provide their Muslim employees with space to pray during breaks and lunches, and adjust break periods during Ramadan to allow their Muslim employees to eat after sundown pursuant to their

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[20] Pet. at 6, *Gilardi v. Sebelius* (No. 13-567).

religion.[21] Whether state or federal law requires such an accommodation of religious exercise in the workplace is irrelevant to the Gilardis; they do so because, in light of their religious beliefs, it is the right thing to do.

Amici Robert and Jacquelyn Gallagher are owners of Good Will Publishers, Inc., which publishes Bibles and works of Catholic spirituality and instruction through its St. Benedict Press. While the business could always earn extra profits by publishing any number of books, the Gallaghers have limited the company, and thus its profits, to publishing only books the Gallaghers believe are consistent with the Catholic faith.[22] To print or publish anything else, even if it meant a substantial increase in profits, would undercut a purpose and mission of the company that cannot be reduced to dollars and cents. Thus, for the Gallaghers, Good Will Publishers and St. Benedict Press are not only profit-making endeavors, they are a religious undertaking.

Just as George Washington famously opined that "religion and morality are indispensable supports" for "political prosperity,"[23] business owners like *Amici* view morality and religion as indispensable supports for their commercial prosperity. While, most certainly, a

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[21] *Id.*

[22] Saint Benedict Press & TAN Publisher's Letter, June 29, 2012, https://books.benedictpress.com/index.php/page/shop:publisherletter712/.

[23] *Farewell Address* (Sept. 19, 1796), in THE FOUNDERS' CONSTITUTION, *supra* n.6, at Vol. 1, Doc. 29.

business can earn profits without a view to religion and morality—perhaps more easily so—*Amici* believe that wealth obtained at the expense of these commitments is not true or authentic prosperity at all, but a spiritual poverty for which no amount of profit-making can substitute. These employers adhere to the words of Jesus, who asked, "For what does it profit a man to gain the whole world and forfeit his soul?" *Mark*, 8:36 (ESV).

For these reasons, *Amici* are justly alarmed at statements suggesting that for-profit businesses, no matter their motivating religious mission or purpose or commitment to ethical principles, should be devoted to making money and nothing else. *See, e.g.*, *Conestoga Wood Specialties Corp. v. Sebelius*, 2013 U.S. App. LEXIS 2706, at *15 (3d Cir. Feb. 7, 2013) (Garth, J., concurring) ("[T]he purpose—and only purpose—of the plaintiff Conestoga is to make money!"). A mentality like this is what undoubtedly gave rise to Ambrose Bierce's definition of "*Corporation*": "An ingenious device for obtaining individual profit without individual responsibility."[24]

While some for-profit corporations may be "different from religious non-profits in that they use labor to make a profit, rather than to perpetuate a religious values-based mission," some for-profit corporations, like those owned by *Amici*, are owned and operated with a view toward more than just earning a profit. *Gilardi v. United States Dep't of Health & Human Servs.*, 733 F.3d 1208, 1242 (D.C. Cir. 2013) (Edwards,

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[24] THE UNABRIDGED DEVIL'S DICTIONARY, p. 43 (D. Schultz & A.J. Joshi eds. 2000).

J., concurring in part and dissenting in part). For many employers, it is an important part of how they carry out and fulfill their personal and religious vocations and of how they serve God and others.

III. The Mandate Injures the Religious Exercise of Religious Business Owners Who Oppose the Mandate.

While the government may not question the sincerity of the religious beliefs of business owners like *Amici*, it directly questions—in fact, seeks to eradicate—their ability to run their businesses according to these beliefs, specifically, on an issue of what they believe to be of supreme importance: the dignity and sanctity of human life, in its creation and transmission.

Each of the *Amici* not only have religious beliefs with respect to the mission of their businesses, and the manner in which they conduct those businesses, they have deeply held religious beliefs regarding the drugs and services that they are required to pay for and provide by the Mandate challenged in these cases. Some business owners, like the Hahns and the Greens, religiously oppose only drugs or services that have an abortifacient mechanism of action; others, such as most *Amici*, oppose contraceptives and sterilization as well. For these employers, the fundamental issue is not just the use of such abortifacient and/or contraceptive methods, it is the requirement that they arrange for their company to pay for and provide such methods in the first place.

It is important to note that the same religious faith that compels employers like *Amici* to care for the needs

of their employees, to provide charitable goods and services to their local communities, and to conduct their business dealings according to the Golden Rule, also compels them not to manage their companies in a way dictated by the Mandate. *Amici* employers cannot in good conscience pick and choose which religious beliefs to adhere to and which to ignore or violate. They form a seamless garment. And though employers like *Amici* direct and manage their companies to comply with any number of laws, rules, and regulations, they cannot do so with respect to the Mandate.

Nonetheless, the government maintains that none of these business owners are injured, let alone their religious exercise substantially burdened, by the Mandate. It argues that because the Mandate only applies to the group health plan a corporation sponsors, the owners of that corporation are not required to do *anything*, let alone anything that violates their religious beliefs or conscience. As the Third Circuit held in its decision below, ". . . the Mandate does not actually require *the Hahns* to do anything. All responsibility for complying with the Mandate falls on *Conestoga*." 724 F.3d at 388 (emphasis in original). Similarly, the Sixth Circuit held that "[t]he decision to comply with the mandate falls on Autocam [the company], not the Kennedys [its owners]." *Autocam Corp. v. Sebelius*, 730 F.3d 618, 622 (6th Cir. 2013), *petition for cert. pending*, No. 13-482 (filed Oct. 15, 2013).

Although it is true that a closely-held corporation is legally distinct from its owners and controllers, the government critically ignores the reality that a corporation cannot comply with a regulation, or take

any steps toward compliance, unless its owners and controllers choose to have it comply. *See Robinson v. Cheney*, 876 F.2d 152, 159 (D.C. Cir. 1989) ("[A] corporation cannot act except through the human beings who may act for it."); *see also Reich v. Sea Sprite Boat Co.*, 50 F.3d 413, 417 (7th Cir. 1995) ("[I]ncorporeal abstractions act through agents."). Indeed, because a corporation is not a self-willing, self-thinking automaton that can operate independently of human agency, *a corporation cannot do anything* in the absence of those who control it. The corporation cannot define itself or its mission on its own (religious or not), or establish or implement policies on its own (religious or not). Any regulation that compels a corporation to do X, Y, or Z, concomitantly and necessarily requires the human agents of that corporation to implement X, Y, or Z, either under the explicit or implicit authority of those who own the corporation.

Normally, of course, there is no need to state the obvious reality that "a corporation acts only through its directors, officers, and agents." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 165 (2001). Owners and managers of corporations routinely ensure that their corporations comply with any number of local, state, and federal regulations. But where, as here, those owners must violate their own religious beliefs in the course of ensuring that their corporation complies with a regulation, it is absurd to suggest that, because of the corporate form, they are not harmed in the exercise of their religion.[25]

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[25] As Judge Randolph noted, in the case of subchapter S corporations (as are many of the businesses of *Amici*) the corporate form is disregarded for purposes of corporate taxation. *Gilardi v.*

The Seventh Circuit described the Mandate's impact on the religious exercise of owners of closely-held corporations this way:

> Complying with the mandate requires them to purchase the required contraception coverage (or self-insure for these services), albeit as agents of their companies and using corporate funds. But this conflicts with their religious commitments; as they understand the requirements of their faith, they must refrain from putting this coverage in place because doing so would make them complicit in the morally wrongful act of another.

Korte v. Sebelius, 735 F.3d 654, 668 (7th Cir. 2013).

And this is how the D.C. Circuit described what the government incorrectly thinks does not amount to any injury: "The contraceptive mandate demands that owners like the Gilardis meaningfully approve and endorse the inclusion of contraceptive coverage in their companies' employer-provided plans, over whatever objections they may have. Such an endorsement—procured exclusively by regulatory ukase—is a 'compel[led] affirmation of a repugnant belief.'" *Gilardi*,

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United States Dep't of Health & Human Servs., 733 F.3d 1208, 1225 (D.C. Cir. 2013) (Randolph, J., concurring). Why, Judge Randolph asked, would Congress have "disregarded the corporate form for subchapter S corporations but then wanted it imposed to prevent their owners from asserting free-exercise rights under RFRA. There is no good answer, or at least we have received none. It would be incongruous to emphasize the corporate veil in rigid form for RFRA purposes while disregarding it for tax purposes under subchapter S." *Id.*

733 F.3d at 1217-18 (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)).

It is therefore incorrect to say that the Mandate's injury to the owners of a corporation is *purely* derivative of the injury to the corporation, as though the owners are mere uninvolved shareholders with only a monetary interest in its financial success. Although the failure to comply with the Mandate would have financially ruinous results for the owners, the harm that they assert is not merely financial. The harm, rather, is *the coercion to violate their own consciences* as the individuals who make the corporation act. In other words, the specter of financial ruin is a source of substantial pressure placed upon the Hahns, Greens, and *Amici* business owners personally to take actions that are prohibited by their faith.

For these reasons, and contrary to the Sixth Circuit's decision in *Autocam*, 730 F.3d at 623, the shareholder standing rule does not and cannot preclude owners like the Hahn and Green families from challenging the Mandate. A well-established exception to this rule allows "a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated." *Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990). As the Seventh Circuit held in *Korte*, the owners "fall comfortably within [this] exception; they have a direct and personal interest in vindicating their individual religious-liberty rights, even though the rights of their closely held corporations are also at stake." 735 F.3d at 669; *see also Gilardi*, 733 F.3d at 1216 ("[T]he Gilardis' injury . . . is 'separate and distinct,' providing us with an

exception to the shareholder-standing rule."). In fact, as Judge Gorsuch noted, because the Mandate requires the Greens to "direct the corporations to comply with the mandate and do so in defiance of their faith," they have "a quintessentially 'direct' and 'personal' interest protected *even under the shareholder standing rule*." *Hobby Lobby*, 723 F.3d at 1156 (Gorsuch, J. concurring) (quoting *Franchise Tax Bd.* 493 U.S. at 336 (1990) (emphasis supplied)).

Religious owners and controllers of closely-held corporations, like *Amici*, sincerely believe that they are religiously and morally responsible for how they manage the assets and resources of their businesses. In addition to the *legal* obligations imposed upon all owners and managers by corporate law, these individuals are subject to *religious and moral* obligations as they own and manage their companies. For these individuals, the intricacies of corporate law do not absolve them of the moral culpability they would bear by managing their corporations to comply with the Mandate against their religious beliefs—and it is wrong for the government to suggest otherwise.[26]

Indeed, *Amici* business owners cannot assuage their consciences by operating under the fiction that what they do in their capacities as owners and managers of

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[26] The government knows that the corporate form cannot shield corporate malefactors like Kenneth Lay of Enron from *criminal* responsibility, and yet it contends that the same corporate form somehow shields owners and managers from *religious and moral* responsibility. Even aside from the constitutional incompetence of the government and the courts to make religious judgments, this profound inconsistency of reasoning exposes the inadequacy of the government's "logic".

the corporation, such as complying with the Mandate, is legally distinct from what they do in their individual capacities as religious believers. *Amici* strive to act consistently with their religious beliefs not only in their personal or individual capacities, but in *all* dimensions of their lives, including as owners, officers, directors, or managers of the corporation. As the Fourth Circuit noted in a different context, "Free religious exercise would mean little if restricted to places of worship or days of observance, only to disappear the next morning at work." *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 319 (4th Cir. 2008).

No one disputes that "[t]he corporate form offers several advantages 'not the least of which was limitation of liability,' but [that] in return, the shareholder must give up some prerogatives." *Conestoga Wood*, 724 F.3d at 388 (citation omitted). But this Court has never held that one prerogative that must be surrendered is the ability to own and operate one's corporation consistent with one's religious beliefs. In fact, as this Court reiterated last term, in the context of unconstitutional conditions, "the government may not deny a benefit to a person because he exercises a constitutional right." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983)); *see also Frost & Frost Trucking Co. v. R.R. Comm'n of Cal.*, 271 U.S. 583, 592–593 (1926) (invalidating regulation that required the petitioner to give up a constitutional right "as a condition precedent to the enjoyment of a privilege"); *Southern Pac. Co. v. Denton*, 146 U.S. 202, 207 (1892) (invalidating statute "requiring the corporation, as a condition precedent to obtaining a permit to do

business within the State, to surrender a right and privilege secured to it by the Constitution").

Stated more directly: citizens do not sign away their religious freedoms when they sign and submit articles of incorporation to a secretary of state. The Mandate imposes a distinct and palpable injury on owners of closely-held corporations who oppose implementing the Mandate and, as discussed in the next section, that injury is substantial.

IV. The Mandate Substantially Burdens the Religious Exercise of Religious Business Owners Like the Hahns, the Greens, and *Amici*.

In an attempt to avoid strict scrutiny in these cases, the government not only tries to keep corporations and their owners from asserting any religious freedom claims at all, it tries to convince this Court that the Mandate does not substantially burden their religious exercise. Regardless of whether a for-profit corporation can engage in religious exercise, it is clear that the Mandate substantially burdens the religious exercise of owners like the Hahns, the Greens, and *Amici* family business owners.

The Mandate requires non-exempt group health plans to cover a range of abortifacient, contraceptive, and sterilizing drugs, devices, and services. Employers like *Amici* business owners object on religious grounds to paying for such services in their health plans, which must be included *whether or not any employee avails herself of them*. The religious claimants' objection is not based or dependent upon the extent to which employees may use these services, it is triggered by the

requirement that they pay for and provide these services in the first place. Any argument, therefore, that the religious burden is somehow "attenuated" by choices of third parties is actually an attempt to rewrite the specific religious objection and burden asserted in these cases.

The government failed to persuade the D.C. Circuit on this score:

> The burden on religious exercise does not occur at the point of contraceptive purchase; instead, it occurs when a company's owners fill the basket of goods and services that constitute a healthcare plan. In other words, the Gilardis are burdened when they are pressured to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties.

Gilardi, 733 F.3d at 1217.

The Seventh Circuit similarly rejected the government's attenuation argument:

> "The religious-liberty violation at issue here inheres in the coerced coverage of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services."

Korte, 735 F.3d at 685 (quoting *Korte v. Sebelius*, 528 Fed. Appx. 583, 587 (7th Cir. 2012) (granting injunction pending appeal)) (emphasis in original).

If the government through a rule or regulation requires one to do X or pay a fine or penalty, but one cannot do X without violating one's religious beliefs, a substantial burden on religious exercise is readily apparent—it puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 717-18. The manner in which the Mandate substantially burdens religious exercise is just as obvious. It requires that employers manage their companies to comply with the Mandate or expose their companies to financial ruin, but these employers cannot do so without violating their religious beliefs. The Mandate thus "affirmatively compels them . . . to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

Quite simply, "[t]he contraception mandate forces [the objecting business owners] to do what their religion tells them they must not do." *Korte*, 735 F.3d at 685. It forces them to choose between following the precepts of their religion and incurring huge penalties on the one hand, or abandoning a precept of their religion on the other hand. *See Sherbert*, 374 U.S. at 404. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against *Amici* for objecting to personally participating in, or facilitating, abortion or contraception. *Id.*

As the D.C. Circuit explained, the Mandate imposes a substantial burden on *Amici*, the Gilardis,

> because the government commands compliance by giving the Gilardis a Hobson's choice. They can either abide by the sacred tenets of their

> faith, pay a penalty of over $14 million, and cripple the companies they have spent a lifetime building, or they become complicit in a grave moral wrong. If that is not "substantial pressure on an adherent to modify his behavior and to violate his beliefs," we fail to see how the standard could be met.

Gilardi, 733 F.3d at 1218 (quoting *Thomas*, 450 U.S. at 718).

In fact, even if one were to characterize the Mandate's burden on the religious exercise of owners and managers as "indirect," because the Mandate is *technically* imposed on the corporation, and not its owners or managers, that is of no moment. Under the substantial burden test enunciated by this Court, courts are to examine the substantiality of "the coercive impact" on the claimants' religious exercise, *Thomas*, 450 U.S. at 717, *not* how direct or indirect that coercive impact is. *Id.* at 718 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial"); *see also Braunfeld*, 366 U.S. at 607 (a rule may be "constitutionally invalid even though the burden may be characterized as being only *indirect*") (emphasis added).

Indeed, the religious claimants in *Sherbert* and *Thomas* were not forced by law to work on the Sabbath and produce armaments, and yet this Court found that their religious exercise was nonetheless substantially burdened through the denial of unemployment benefits, which indirectly pressured them to violate their religious beliefs. Here, however, the burden imposed by the Mandate is even more direct than in *Sherbert* or *Thomas*; it affirmatively compels *Amici*

business owners to undertake actions in direct violation of their religious beliefs. As far as these owners are concerned, the Mandate operates like a law requiring Adell Sherbert to work on her Sabbath, or Eddie Thomas to help manufacture arms, backed by the sanction of ruinous penalties for non-compliance.

In short, the Mandate imposes a substantial burden on the religious exercise of objecting business owners like *Amici*, the Hahns, and the Greens.

V. Recognizing that the Mandate Violates the Free Exercise Rights of Individuals and their Businesses Would Not Prompt a Flood of RFRA Litigation.

Any argument that respecting the rights of owners to act consistently with their religious beliefs in how they manage their company would somehow allow them to escape the reach of various federal laws governing the workplace is simply untenable. Under RFRA, where a law substantially burdens a sincere religious exercise, that is only the beginning of the analysis, not its conclusion. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006) (a "*prima facie case* under RFRA" exists where a law "(1) substantially burden[s] (2) a sincere (3) religious exercise") (emphasis supplied). The government can justify the burden by demonstrating that the law serves a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(b).

This limiting principle built into the framework of RFRA itself is enough to ensure, for example, that owners of closely-held corporations will not be able to

invoke the statute to avoid paying social security taxes, *see, e.g., United States v. Lee*, or to force employees to violate their own religious beliefs, *see, e.g., EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988).

In point of fact, and consistent with state and federal laws, none of *Amici* discriminate in employment based on religion, nor have any desire to do so. *Amicus*, Frank O'Brien, a Catholic, has stated as a key value for his family of companies: "We will not discriminate based on anyone's personal belief system."[27] And, as previously described, the Gilardi brothers see to it that the religious beliefs of their employees are generously accommodated, even beyond what state and federal laws require.

With respect to the services required by the Mandate, while each *Amicus* business owner strenuously opposes the Mandate and the manner in which it requires them to violate their religious beliefs, none of these employers prohibit or otherwise limit their employees from accessing or paying for any contraceptive services with the salaries they have earned. Just as the employers in these cases seek to have their freedom of conscience respected in how they allocate their companies' resources, they respect their employees' freedom of conscience to spend their salaries how they choose.

If a page of history is worth a volume of logic, history is most persuasive here in showing that religious owners of corporations are not using their

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[27] *Mission & Values, supra*, n. 16.

religious freedoms in some oppressive or irresponsible way. RFRA was passed just over twenty years ago, and yet there is a veritable dearth of case law involving employers invoking RFRA to circumvent or seek exemptions from laws pertaining to health, safety, or discrimination in the workplace.

In addition, it has been the law in the Ninth Circuit for twenty-five years, per its decision in *Townley*, that corporations can, at times, assert the religious rights of their owners. *See id.* at 619-20. And yet, here too, there is no widespread evidence of employers within the states of the Ninth Circuit invoking this doctrine to unleash an onslaught of challenges to government regulations.

The point of the matter is that employers, like *Amici*, the Hahns, and the Greens, are content to manage their corporations in a way that complies with thousands of state, local, and federal laws and regulations that, unlike the Mandate, do not require them to violate their religiously-formed consciences. And in light of the fact that it is the religious beliefs of many such employers that motivates them to provide their employees with a decent wage, an accommodating workplace, and a health plan to begin with, it is unsurprising that employees of such corporations rarely object to their employers' incorporation of religious tenets in the management of their businesses.

Should this Court adopt the government's position that owners of closely-held corporations have no cognizable right to manage their businesses according to their religious beliefs, this will not only harm the employers themselves, it stands to harm their employees, their dependents, and society in general. A

business owner, for example, who cannot in good conscience allow his company to comply with the Mandate will face financial penalties so steep that he will be forced to shut down the company completely.[28] Such a result would negatively impact every person with something at stake in the viability of the company—*even the government*, which has an obvious interest in sustaining businesses and encouraging job growth.

Directly at stake in the cases at bar is the right of citizens, like *Amici* family business owners, to manage their businesses consistent with the dictates of their religious beliefs. If, as the government argues, neither a family-owned corporation nor the family members themselves can challenge a regulation like the Mandate on RFRA or Free Exercise grounds, then such individuals will have no legal recourse or remedy when forced by the government to act against their religious conscience. They must necessarily kowtow, now and in the future, to any government edict that compels them to run their family business in violation of their religious beliefs.

No constitutional principle permits this. Our country's longstanding respect for freedom of religion and conscience prohibits it. This Court cannot allow it.

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[28] In the case of *Amici* Frank and Phil Gilardi, for example, those penalties would total $14 million per year. *See Gilardi*, 733 F.3d at 1218.

CONCLUSION

For the foregoing reasons, *Amici* respectfully ask this Court to hold that the Mandate imposes a distinct legal injury on the Hahns and the Greens, and that it substantially burdens their religious exercise.

Respectfully submitted,

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JANUARY 28, 2014